No. 91-2076

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term 1991

SHIRLEY CLARK,

Petitioner,

v.

HAAS GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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June 26, 1992

QUESTIONS PRESENTED*

1. Do principles of res judicata require that, in every case involving an employment relationship, each party must assert every claim that is available against the other party, or be forever barred from asserting it?

2. Where an employee sued her employer for failure to pay her overtime, and then enters into a settlement agreement that releases her employer only from claims for "overtime and minimum wages," may a subsequent action for discriminatory discharge be dismissed as res judicata without considering proffered evidence of the parties' intent to limit the scope of the settlement?

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* All parties below are listed in the caption. However, when the action was filed, respondent was called Haas Publishing Company.

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SHIRLEY CLARK,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Shirley Clark petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals in this matter.

OPINIONS BELOW

The district court denied the motion of respondent Haas Group for summary judgment based on res judicata in an unreported opinion that is set forth at pages 11a to 13a of the Appendix ("App. 11a to 13a"). The court of appeals reversed the jury verdict in favor of petitioner, on grounds of res judicata, in an opinion that is reported at 953 F.2d 1235, and that is set forth at App. 1a to 9a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 15, 1992. App. 1a-9a. The court of appeals denied a petition for rehearing on February 27, 1992. *Id.* 10a. On May 19, 1992, Justice White extended the time for filing a petition for a writ of certiorari until June 26, 1992. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. Facts.

Petitioner Shirley Clark was employed by respondent Haas Group, Inc., a publisher of apartment guides that it distributed in approximately forty cities across the country. After she was hired in January, 1984, Clark received glowing evaluations and rapid promotions. She worked twelve hour days, and received seven pay increases, bringing her annual salary to $20,500.

In 1986, Haas undertook to revamp both its organization and its image in light of the company's rapid growth. It promoted a company slogan of "Haas Pizazz," which, according to Clark's evidence that was apparently credited by the jury, placed an emphasis on youth. There were a number of other pieces of evidence that also suggested that the company had a preference for younger workers.

On October 31, 1986, petitioner was fired, at age 51, and her duties were reassigned to a 30-year-old woman. Respondent gave a number of reasons that would have justified her discharge, but petitioner challenged them almost immediately by filing a charge with the Equal Employment Opportunity Commission, alleging that respondent had discriminated against her because of her age and gender.

While that claim was pending, in May, 1987, petitioner sued respondent in the United States District Court for the District of Colorado, seeking to recover unpaid overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201

et seq. Petitioner's claim against respondent was based solely on an alleged company-wide policy of refusing to pay overtime; petitioner did not raise any claim regarding her discharge, nor allege any type of discrimination. Eventually the parties agreed to settle the suit, and respondent sent petitioner a broad stipulation of dismissal that would have released any claims of any kind that petitioner might have against respondent "from the beginning of the world" to the date of her signature on the document. Petitioner refused to settle on that basis, and instead agreed only to release claims for unpaid overtime compensation or minimum wages under the FLSA and any similar state law. Respondent agreed to modify the settlement agreement accordingly. The parties then signed the settlement agreement on July 18, 1988, and the district court entered a stipulated order of dismissal, pursuant to the settlement agreement. Meanwhile, on October 26, 1987, after the FLSA claim was filed, but before it was resolved, the EEOC issued its right to sue letter. App. 12a.

B. Proceedings Below.

On October 31, 1988, petitioner sued respondent in the United States District Court for the District of Colorado, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 601 *et seq.*, alleging that she had been fired because of her age, and under the Equal Pay Act, alleging that she had received less pay than similarly situated men.[1] The Equal Pay Act claim was voluntarily dismissed, and respondent moved for summary judgment on the ground that the ADEA claim was barred by res judicata. Respondent's theory was that petitioner could have raised her discrimination claims against it in her previous action, and that she could not split the claims arising out of her employment relationship with respondent into separate suits for overtime pay and for discriminatory discharge. Petitioner quoted the relevant language of the settlement agreement and provided an affidavit from her counsel in the FLSA action, explaining the negotiations that had produced that language. Based on that history, she argued that the parties had limited their settlement to

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[1] The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1343.

petitioner's overtime claims, and that, in any event, the FLSA action had not resolved her discrimination claims.[2]

The district court denied summary judgment, App. 11a-13a, and the case proceeded to trial before a jury. The jury rendered a verdict in favor of petitioner for back pay and front pay, and the district court awarded petitioner her attorney fees. Respondent appealed, raising a number of objections to the verdict, including the amount of the verdict and whether front pay was a question for the court or the jury. It also contended that the FLSA settlement was res judicata of the discriminatory discharge claim. In this regard, respondent relied on a previous decision of the Tenth Circuit, *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), which had adopted the rule that all claims arising out of a single contractual relationship must be raised in a single action. In addition, respondent argued that, because the ADEA provides for enforcement by the same procedures as the FLSA, a settlement of overtime claims under the FLSA necessarily includes ADEA claims as well.

Petitioner argued, however, that respondent had acquiesced in the splitting of her claims, if indeed that was what had happened, when it agreed to eliminate the release of all claims "from the beginning of the world" and substituted a narrow release of overtime compensation and minimum wage claims. Because the rule against claim splitting is intended to protect defendants against being harassed by repetitive actions, a defendant should not be heard to complain when it consents to the splitting. And, in any event, petitioner argued that she had not split her claims because not all claims arising out of a single employment relationship were part of the same transaction for purposes of res judicata.

The court of appeals reversed on res judicata grounds, thus finding it unnecessary to reach the remaining grounds for respondent's appeal. It invoked its own decision in *May v. Parker-Abbott Transfer & Storage*, 899 F.2d 1007 (10th Cir. 1990), which had

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[2] The settlement agreement was not introduced in the district court because it contained a non-disclosure provision that respondent refused to waive.

extended *Petromanagement* to hold that the resolution of a claim under the Employee Retirement Income Security Act ("ERISA"), which sought to enforce provisions in a pension trust agreement requiring an employer to make certain contributions, barred a subsequent ERISA action to enforce another provision of the trust agreement requiring an audit of employer records to evaluate the adequacy of those contributions. Thus, actions arising under the same contract were barred, even if the second action arose under a statute rather than the common law. In adopting the rule of *May*, the Tenth Circuit had acknowledged, 899 F.2d at 1010, that its decision conflicted with the decision of the D.C. Circuit in *Machinists National Pension Fund v. Industrial Gear Mfg. Co.*, 723 F.2d 944 (1983).

In the decision below, the Tenth Circuit extended the rule in *May* still further, holding that all claims -- whether or not they are based on an employment contract -- that arise out of the same employment relationship, necessarily arise out of a single transaction, and thus must be raised in a single action, or are barred. App. 8a. This is true even when, as here, there were two legally distinct claims with no overlap in the facts. *Id.* 4a. After all, the court reasoned, under Rule 8 of the Federal Rules, petitioner could have included both claims in the same complaint against respondent, *id.* 8a, and "*res judicata* precludes parties from 'relitigating issues that were or could have been raised in the prior action.'" *Id.* 9a. The court ignored the limiting language of the settlement agreement, in effect holding that parties may not agree between themselves to limit the preclusive effect of a settlement.

Petitioner sought rehearing and rehearing en banc, which were both denied.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Conflicts with Decisions of Several Other Circuits, and Raises Important Questions of the Law of Res Judicata as Well as the Ability of Parties to Settle Cases on Terms Agreeable to Themselves.

Under section 24 of the *Restatement (Second) of Judgments*, which several lower federal courts, including the Tenth Circuit, have adopted, a judgment precludes litigation of all claims arising out of the same transaction or series of connected transactions.[3] Whether a factual grouping constitutes a single transaction or series of transactions is, in turn, to be determined pragmatically, considering whether they are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit corresponds to the parties' expectations or business usages.

The decision below holds that, whenever an employee brings a single claim against her employer, all claims arising out of the employment relationship must be raised at the same time because employment is a single transaction. That holding conflicts with several different lines of authority from the other circuits. *Infra*, 7-12. The Tenth Circuit's refusal to consider the parties' intent in applying their consent dismissal disregards both the holdings of other circuits, and the important statutory policy regarding res judicata generally, that waivers of rights under the ADEA -- including waivers through the settlement of litigation -- must be voluntary and knowing. *Infra*, 13-15. And in both respects, the decision below disregards both the limiting language of the *Restatement*, and the practical dangers that are posed to a continuing employment relationship if, once the parties choose to air a limited dispute, they must air or surrender all their grievances against each other at the same time. *Infra*, 15-18.

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[3] *E.g.*, *Car Carriers v. Ford Motor Co.*, 789 F.2d 589, 593, 594 (7th Cir. 1986); *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 and n.4 (5th Cir. 1983) (*en banc*); *Poe v. John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir. 1982).

It would force an employee, faced with the short limitations period that is provided for many kinds of employment claims, to include in her complaint every possible claim, despite the need for careful investigation before filing as required by Rule 11; similarly, because compulsory counterclaims under Rule 13(a) are also determined based on the "same transaction," it would force employers to bring or waive any counterclaims arising out of the employment relationship within the same short timeframe. And, even worse, the parties could not decide to limit their dispute by entering into settlement agreements that were intended to be limited to one aspect of the employment relationship. Thus, once a single lawsuit were initiated between an employer and employee, both sides would have to be committed to total war against the other, in which every conceivable claim would have to be joined and litigated.

Given these consequences, it is not surprising that no other circuit has adopted the sweeping approach of the Tenth Circuit to the application of res judicata to claims of employers and employees. Because of the conflict among the circuits, as well as the dangers posed both to employment relations and to sensible litigation of employment cases, the Court should grant certiorari.

1. The decision below is squarely contrary to the holdings of other circuits that permit employees to raise claims arising out of different aspects of the same employment relationship in successive actions. For example, in *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), a professor filed an action under various civil rights statutes claiming that her university had discriminated against her because of her gender in matters related to promotions and pay. After these claims were lost at trial, she filed an action claiming that she and her husband had been subjected to retaliation because she claimed discrimination in the first place. The district court held that the first action precluded the second, on the ground that the claims in the second action could have been included in the prior one, but the Eleventh Circuit reversed. It noted that there was no indication that Wu had raised retaliation claims in the gender discrimination action, and that res judicata did not bar the prosecution of a second action against her employer based on this different claim. *See also Meding v. Hurd*, 607

F. Supp. 1088, 1097 (D. Del. 1985) (as originally pleaded, state suit for unlawfully withheld benefits arose from different transaction than improper termination alleged in federal suit under 42 U.S.C. § 1983, but amendment of state complaint to include claims over termination made its disposition res judicata of part of federal suit); *Mahroom v. Hook*, 563 F.2d 1369, 1377 (9th Cir. 1977) (administrative dismissal of federal employee's claim over alleged discrimination in 1971 promotion did not bar claim over 1973 promotion, because latter claim was new cause of action).

Similarly, in *May v. Morganelli-Heumann & Associates*, 618 F.2d 1363 (9th Cir. 1980), an architect sued a developer for failing to make the payments required by a contract whereby the architect had been hired to design a project. After that action was settled, May sued both the developer's estate and a second architect for having used his drawings in violation of the copyright laws. The district court granted summary judgment on the ground that the settlement of the first action precluded the second, but the Ninth Circuit reversed, holding that two separate claims could be brought based on two separate causes of action involving the same project.

And in *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), an employee of a school district sued the district in state court for having fired her for placing her son in a private, segregated school, in violation of a state statute forbidding public schools from requiring teachers to place their children in the same school system in which the parent is employed. The state courts dismissed the action on the ground that the failure to attend the same public school was not the sole reason for her discharge. The employee then sued under 42 U.S.C. § 1983, alleging that, by forcing her to choose between educating her child in the manner she desired and her public employment, the school district had invaded her constitutional right of family privacy. The Fifth Circuit reversed the trial court's grant of summary judgment on res judicata grounds, holding that the two different claims arose from two separate rights and involved determination of different sets of facts, and thus the second action was not precluded by the first. 718 F.2d at 1360.

Petitioner acknowledges that, when an employee who has been discharged seeks judicial redress, other circuits have held that any claims that employee had based on the same discharge must be brought in a single action, despite the fact that they are brought under different federal statutes, *e.g.*, *Fleming v. Travenol Laboratories*, 707 F.2d 829, 833-834 (5th Cir. 1983), or even state and federal laws. *E.g.*, *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988); *Ruple v. City of Vermillion*, 714 F.2d 860 (8th Cir. 1983). But all of these cases have treated the *discharge* as the transaction that is involved in both cases. None has suggested that the entire employment relationship is the transaction out of which all the claims arose, and indeed we are aware of no other circuit that has adopted the Tenth Circuit's view that an employee must bring all claims related to her employment relationship in the same action. Indeed, one of the illustrations to the *Restatement (Second) of Judgments* assumes that separate claims may be brought pertaining to the same employment relationship. *Id.* § 24, Comment d and Illustration 8, at 201-202 (1982).

2. The Tenth Circuit's decision is also contrary to the consistent view of the other circuits that, for the purpose of compulsory counterclaims, an employer's employment-related claims against an employee do not necessarily arise out of the same transaction as the employee's employment claims against the employer. The question has repeatedly arisen under Rule 13 of the Federal Rules of Civil Procedure, which requires a defendant to bring as a counterclaim all claims against the plaintiff that arise out of the same transaction or series of transactions as the plaintiff's claims. If all employment-related claims necessarily arose out of the same transaction, then the compulsory counterclaim rule, which is the mirror image of the *Restatement*'s rule on res judicata, would obviously require employers to bring any possible set-off, unfair competition, breach of loyalty, and similar claims against the employee once the employee initiated litigation over any employment-related claim.

Yet the lower courts have repeatedly refused to do that. For example, in *Burlington Northern R. Co. v. Strong*, 907 F.2d 707 (7th Cir. 1990), an employee sued his employer under the Federal Employers Liability Act ("FELA") for injuries occurring during

his employment, and the employer tried, but failed, to have the consequent judgment reduced by the amount of supplemental sickness benefits that it had paid to the employee on account of the injury. Rather than appealing the district court's refusal to allow a set-off, the employer sued the employee under the collective bargaining agreement to recover the benefits, and the employee argued that the claim was res judicata, because it arose out of the same transaction as his employment-related injury claim, and thus had to be pleaded as a compulsory counterclaim. The Seventh Circuit rejected this argument, 907 F.2d at 710-712, holding that the two claims did not arise out of the same transaction, that they raised different legal and factual issues, and that judicial economy would not be served by joining both claims in the same action.[4]

Similarly, in *EEOC v. First National Bank of Jackson*, 614 F.2d 1004 (5th Cir. 1980), the Commission sued an employer on behalf of its black employees, alleging that it had discriminated against them on the basis of their race, and the employer counterclaimed for a set-off against those employees under the state tort of "recoupment," which was based on the allegation that the EEOC's proceedings were a conspiracy with the employee who had brought the charge. The federal court, however, would have had jurisdiction over the counterclaim, only if it was a compulsory counterclaim because it arose out of the same transaction or occurrence as the claim set forth in the complaint. The Fifth Circuit held that the two claims did not arise out of the same transaction. 614 F.2d at 1008. Subsequent to *First National Bank*, the courts in the Fifth Circuit and elsewhere have generally held that counterclaims do not arise out of the same transaction simply because they arise out of the same employment relationship. *E.g.*, *Giles v. Roadway Express*, 529 F. Supp. 37 (S.D. Miss. 1981) (counterclaim for excess wages paid to employee who sued for employment discrimination was not compulsory); *Frank v.*

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[4] The court also held, in the alternative, that the second claim did not exist until the first one was resolved, and thus that res judicata was barred by the exception for later maturing claims. *Id.*, 907 F.2d at 712. The first holding, however, consumed most of the court's attention, and is squarely contrary to the Tenth Circuit's holding here.

Bloomcraft Inc., 52 FEP Cases 1742 (S.D.N.Y. 1990) (counterclaim for employee's misconduct in tape-recording conversation not compulsory in ADEA action); *see also Kirk v. Board of Educ. of Bremen School District*, 811 F.2d 347, 352-355 (7th Cir. 1987) (teachers not precluded from suing under Title VII because of failure to raise counterclaim to earlier state action against them by employer to enforce arbitrator's decision); *Kolta v. Tuck Industries*, 11 FEP Cases 142, 144 (S.D.N.Y. 1975) (counterclaim that employee worked poorly did not arise out of same transaction as discriminatory treatment claim).

3. The Tenth Circuit's position that all employment-related claims between an employer and employee arise out of the same transaction flatly contradicts the analysis of other lower courts in yet another area of the law, relating to the removal of pendent state law claims where the complaint raises claims under both state and federal law. Under 28 U.S.C. § 1441(c), if a separate and independent federal claim is joined with an otherwise non-removable state claim, the federal courts have discretion either to exercise pendent jurisdiction over all the claims, or to remand the state claim to state court; the courts have broad discretion to remand the separate and independent claim. But if the plaintiff seeks recovery for a single wrong under various legal theories, the two sets of claims are not separate and independent, and the court will ordinarily hear both claims, especially if the federal claim goes to trial. The question of whether the two claims are separate and independent depends on whether they "derive from a common nucleus of operative fact. . . . [I]f . . . a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding," then the federal courts will ordinarily try the state law claims along with the federal ones. *UMW v. Gibbs*, 383 U.S. 715, 725 (1966).

Although this is not precisely the same question as whether one claim would be res judicata of the other, the courts have tended to decide the question of jurisdiction under *Gibbs* by deciding whether the two sets of claims arise out of the same transaction. *See* 1B *Moore's Federal Practice* ¶ 0.410, at 361 n.26 (1992) (treating *Restatement* definition and *Gibbs* standard as comparable, and *citing Restatement (Second) of Judgments*, Re-

porter's Comment on § 24, Comment a, at 207 (1982)). In that regard, the lower courts have consistently refused to treat all employment-related claims between the same employee and employer as necessarily arising out of the same transaction. For example, in *Lewis v. Louisville & Nashville R. Co.*, 758 F.2d 219 (7th Cir. 1985), an employee sued his employer in state court under the FELA for injuries incurred during his employment, and amended his complaint the following year to allege that the employer had retaliated against him, in violation of state law, for pursuing his FELA rights. The state court ultimately dismissed the FELA claims, at which point the employer removed the remaining state law claim to federal court, based on diversity jurisdiction. The plaintiff moved to remand to state court, arguing that, under the thirty-day limit of 28 U.S.C. § 1446(b), the employer had to remove, if at all, as soon as the retaliation count was added to the complaint. The employer argued that it could not have removed at that time because the retaliation claim arose out of the same facts and transactions as the FELA claims, which, under 28 U.S.C. § 1445(a), were not removable. The district court denied the motion to remand, but the Seventh Circuit reversed. It expressly disagreed with the employer's argument that the retaliation claim arose out of the same transaction as the injury claims, holding rather that it alleged a different wrong and a different set of facts. Therefore, the retaliation claim was separate and independent from the FELA claim, and thus the failure to remove it within thirty days of its inclusion in the complaint barred a later removal. 758 F.2d at 221-222.

Other lower courts have reached similar results involving claims arising from the same employment relationship. For example, in *Nesbitt v. Bun Basket*, 780 F. Supp. 1151 (W.D. Mich. 1991), an employee sued his employer in state court, alleging both that it had failed to pay him overtime, in violation of the FLSA, and that he had been terminated without cause in violation of a state law employment contract. The court held that the two claims were separate and independent and that there was no need to try them together. Accordingly, it retained jurisdiction over the FLSA claim but remanded the state claim to state court. 780 F. Supp. at 1153.

4. The decision below conflicts with the holdings of other lower federal courts in yet another way. The court of appeals refused to consider the evidence offered by petitioner regarding the intent of the parties under the settlement agreement dismissing the FLSA complaint. Petitioner offered to show that the parties intended to limit the effect of the dismissal to overtime and minimum wage claims, and did not intend it to preclude claims based on discriminatory discharge, but the Tenth Circuit ignored this evidence in reversing the district court's denial of summary judgment on res judicata grounds. This refusal to consider the parties' intent is consistent with *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1504-1505 (11th Cir. 1990), but contrary to the holdings of most other lower courts.

Thus, under the *Restatement (Second) of Judgments*, § 26(1)(a), ordinarily a stipulated dismissal is res judicata over other claims arising out of the same transaction, and thus precludes the splitting of claims just as a litigated judgment does. However, under the *Restatement*, the parties are free to agree to a splitting of claims if that is what it takes to reach a settlement. This proposition logically follows from the fact that a consent judgment is essentially a contract between the parties, whose intent governs the interpretation of the judgment's effect.

For example, the Fourth Circuit held in *Keith v. Aldridge*, 900 F.2d 736, 740 (1990), that "the preclusive effect of [a consent] judgment is determined by the intent of the parties," although it then rejected the plaintiff's contention that the parties had intended to carve out his second claim from the settlement of an earlier claim. In *Young-Henderson v. Spartanburg Area Mental Health Center*, 945 F.2d 770, 774-775 (4th Cir. 1991), the same court, while expressing doubt that an action based on a discharge would be precluded by the settlement of an earlier action over the failure to promote, and the subsequent suspension of, the same employee, found it unnecessary to reach the issue because the parties did not intend to bar later claims, as evidenced, in part, by the fact that the parties had not taken the later claims into account in negotiating the consent order.

Similarly, in *Calderon Rosado v. General Electric Circuit*

Breakers, 805 F.2d 1085, 1087 (1st Cir. 1986), plaintiff brought claims in state court for unpaid overtime compensation and for "unjustified" discharge in violation of the law of Puerto Rico; the state court granted summary judgment for defendant on the overtime claim but, with the agreement of both sides, granted a motion for voluntary dismissal of the discharge claim with prejudice so that the legality of the discharge could be litigated in federal court under the ADEA, which had not been raised in the state court. Once the ADEA action was filed, however, the employer contended that the consent dismissal with prejudice on the state law discharge claim was res judicata. The district court agreed, but the First Circuit reversed, holding that, because the rule against claim splitting is intended primarily to protect a defendant against multiple litigation, the protection could be and had been waived when the defendant failed to object, before entry of the first judgment, to the plaintiff's expressed intention to litigate an ADEA claim in a later suit. *See also Torres v. Rebarchak*, 814 F.2d 1219, 1226 (7th Cir. 1987); *Medina v. Wood River Pipeline Co.*, 809 F.2d 531, 533-534 and n.1 (8th Cir. 1987); *Imperial Constr. Mgmt. Corp. v. Laborers*, 729 F. Supp. 1199, 1205-1206 (N.D. Ill. 1990).[5]

There is another body of law that also conflicts with the lower court's refusal to consider the parties' intent. Under respondent's theory, adopted by the court of appeals, petitioner, in essence, waived her ADEA claim when she settled her FLSA suit. But the courts have been quite uniform in allowing waivers of ADEA rights only when, based on a totality of the circumstances, it is clear that the individual actually intended to release ADEA claims and understood that he was accomplishing that goal by entering into the agreement. *E.g.*, *Bormann v. AT&T Communications*, 875 F.2d 399, 401-403 (2d Cir. 1989); *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 522-523 (3d Cir. 1988). In adopting this rule

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[5] Although the issue does not appear to have been raised in *Calderon Rosado*, we note that there was no suggestion that the dismissal of the overtime claim precluded litigation of the age discrimination claim; rather, only the dismissal of the state law discharge claim, which sought substantially the same relief as the ADEA claim, was said to have a preclusive effect on the ADEA claim. 805 F.2d at 1086.

for the ADEA, the lower courts have reasoned that it follows from this Court's statement in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974), that Title VII rights may be waived only if "the employee's consent to the settlement was voluntary and knowing." The Seventh Circuit has expressly applied the "knowing and voluntary" standard to determine whether the settlement of a previous lawsuit included a waiver of rights under Title VII. *Riley v. American Family Mut. Ins. Co.*, 881 F.2d 368, 373-374 (1989). The Tenth Circuit's refusal even to consider the parties' intent in deciding whether petitioner surrendered her rights under the ADEA thus conflicts with the analysis of this Seventh Circuit decision as well.[6]

In this case, although petitioner argued that the language and circumstances of the settlement agreement showed that the parties recognized that only minimum wage and overtime claims were being resolved by the stipulated dismissal of the first action, the Tenth Circuit declined to address her evidence of intent and ruled solely on the fact that both actions involved the same employment relationship. Because its refusal to consider any evidence bearing on the parties' intent conflicts with the holdings of most other federal courts, the Court should grant certiorari on this issue as well. Although the Tenth Circuit did not expressly address the issue, but simply ignored petitioner's central argument below, the Eleventh Circuit has expressly disregarded the parties' intent in a reported opinion. *Citibank, supra*, 904 F.2d at 1504-1505, *citing Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986). This case squarely presents the issue of the relevance of evidence of the parties' intent in dismissing the first action, on which there is disagreement among the lower federal courts.

5. In addition to the foregoing conflicts among the circuits that require this Court's resolution, the decision below also warrants review because of the damaging effect that the Tenth

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[6] The Older Workers Protection Act amended the ADEA in 1990 to incorporate the principle that waivers must be knowing and voluntary. 29 U.S.C. § 626(f); *see* Senate Report No. 263, 101st Cong, 2d Sess. 31-35, 61-62 (1990), *reprinted in* 1990 U.S. Code Cong. and Admin. News 1509, 1537-1540, 1566-1567 (discussing cases).

Circuit's approach to res judicata will have on employment relationships and employment litigation. Although it is no doubt harmful to the relationship between an employer and an employee to have to resolve any of their differences in court, rather than by negotiation, there is a substantial difference between, on the one hand, accusing the employer of maintaining an improper policy on overtime compensation, based on a good-faith disagreement about whether a particular position is managerial, and, on the other, accusing the employer and individual supervisors of racism, sexism, suborning perjury by punishing employees who refuse to commit it, and the like. Similarly, there is a world of difference between simply defending a claim over the proper calculation of pay, and raising a counterclaim accusing the employee of running the business into the ground or stealing trade secrets. It is scarcely conducive to good employment relations to compel employers and employees who may have a discrete disagreement that can be resolved through the courts, without irreparably damaging their relationship, to include, or lose, every possible claim that they may have against each other.

And yet, according to the Tenth Circuit, once an employee brings a lawsuit against her employer on any claim relating to their employment relationship, both sides are obligated to escalate the litigation by asserting each and every one of the employment-related claims that they have against each other. Indeed, they must not only litigate those claims of which they are aware, and for which they have sufficient factual basis, but they must think long and hard about any claims they may only vaguely suspect that they have, and for which they may be able to develop a factual basis during the course of the litigation. And they must consider, not only whether it would be unduly destructive of the course of the employment relationship to bring all possible claims into the action, but also whether they might eventually change their minds about the desirability of preserving a civil relationship and come to regret having waived the most egregious claim or counterclaim by the failure to raise it at the outset.

Moreover, the employer and employee will have to raise all of these claims even though the statute of limitations would otherwise give them the option of waiting. Many employment-

related claims have a statute of limitations of only six months, *e.g.*, *DelCostello v. Teamsters*, 462 U.S. 151 (1983); *see also* 42 U.S.C. § 2000e-5 (180 days to file claim with EEOC, and 90 days to sue after receiving right to sue letter from EEOC). Other claims may be brought three years or more after the cause of action accrues. *E.g.*, 29 U.S.C. § 216 (willful violations of the FLSA). If an employee sues on any employment-related cause of action within the first few months of its accrual, he must include all claims immediately or risk a finding of res judicata.

The danger may be even worse from the perspective of an employer-defendant. After all, the defendant has only twenty days within which to file its answer and any compulsory counterclaims, or it too risks waiver. If the Tenth Circuit is correct in holding that the employment relationship is itself a single "transaction," the employer must try to imagine all possible employment-related claims that it may eventually want to bring against the employee, whether or not they relate to the specific claim in the complaint, and decide whether to sue on them, all within this brief period of time.

The adverse effects of the Tenth Circuit's construction of the "transaction" rule are magnified manyfold by the fact that the parties cannot, at least in the Tenth and Eleventh Circuits, control the preclusive effects of their own settlements. Rather, once the lawsuit has begun, and the parties have been forced to level all of their guns at one another, they must keep blasting away to a final conclusion on every conceivable claim, because, even if they intend to limit a settlement to a particular issue, while reserving the right to disagree on the other issues, the courts will not honor the parties' expressed intentions, but will insist on deciding whether there is res judicata based solely on the relationship between the two actions. Like a rule that removes the subject of attorney fees from bargaining, a rule that in effect forces all possible claims into the bargaining, and makes it more difficult for parties to negotiate limited settlements if that is the only matter on which they can agree, runs counter to the important federal policy encouraging negotiated settlements. *See Evans v. Jeff D.*, 475 U.S. 717, 733-738 (1986).

The doctrine of res judicata is intended to protect defendants against excessive litigation and to reduce to workload of the courts. It is hard to believe that a doctrine that pushes employees and employers to bring more claims against each other, and then prevents them from settling less than all of their disagreements, will accomplish either of those objectives. Indeed, employment law is one of the fastest growing legal specialties, in light of both the increase in state and federal causes of action and the heightened public attention given to various issues of discrimination. The Court should grant review now to consider the desirability of an approach to res judicata that is likely to generate more employment-related litigation and the animosity that inevitably results from it.

The scope of claim preclusion, and the ability to limit the effect of res judicata through the negotiation of a settlement agreement, are questions on which all parties need to know the answers in advance of their litigation and settlement decisions, rather than learning in hindsight after the legal questions have percolated among the lower courts. This is an area in which the parties, at least to the extent that they are conscious of their possible claims, can protect themselves by taking the proper steps. Because the decision below threatens to frustrate the objectives of the law of res judicata, as well as because of the specific conflicts among the lower federal courts that are raised in this petition, the Court should grant certiorari.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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* Counsel acknowledge the invaluable assistance of Jon Romberg, then a student at the Northeastern University School of Law, in preparing this petition.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIRLEY CLARK,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 90-1353
	)	No. 90-1362
HAAS GROUP, INC.,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 88-Z-1789)

SUBMITTED ON THE BRIEFS.

Richard C. LaFond and Jay R. Khandke of Denver, Colorado, attorneys for Plaintiff-Appellee.

James J. Thomas, II and David L. Balser of Long, Aldridge & Norman, Atlanta, Georgia, attorneys for Defendant-Appellant.

Before McKAY, Chief Judge, BARRETT and BRORBY, Circuit Judges.

BARRETT, Senior Circuit Judge.

Hass Group, Inc. (HGI) appeals from the judgment entered in favor of Shirley Clark (Clark) and two orders of the district court denying its motions for summary judgment and for judgment notwithstanding the verdict, a new trial, or remittitur.

HGI is in the business of publishing and distributing apartment guides in approximately forty cities. HGI sells advertising in its guides to various apartment owners. The guides are distributed free of charge to the public by placing them in various retail outlets including supermarkets and convenience stores.

Clark, then age 49, was employed with HGI on January 11, 1984. She worked for HGI until October 31, 1986. During her employment with HGI, Clark worked as a distribution co-manager, distribution manager, and assistant regional distribution supervisor. Clark's work included, but was not limited to, delivery of the guides, promotion of the guides, overseeing and implementing all areas of distribution of the guides, and coordinating with the home office.

HGI fired Clark, then fifty-one years of age, on October 31, 1986, citing nonperformance of job duties, refusal to do assigned work, neglect in turning in travel reports, and failure to follow up on correspondence with King Soopers, nearly resulting in the loss of the account. Several months later, Clark went into the magazine distribution business as self-employed until June, 1988.

Clark sued HGI in the federal district court for the District of Colorado on May 18, 1987, under the Fair Labor Standards Act, 29 U.S.C. § 216(b), to recover unpaid overtime compensation, liquidated damages, and attorney's fees and costs. The parties subsequently filed a stipulated motion to dismiss Clark's action with prejudice. On July 27, 1988, the court entered an order dismissing the action with prejudice, directing the parties to bear their own costs.

In July, 1988, Clark went to work as an assistant distribution manager for HGI'S only competitor in Denver, Colorado, at a salary of $18,000.00 per year. On November 1, 1988, Clark was promoted to distribution manager at a salary of $25,000.00 per year. She was terminated three and one-half months later.

On October 31, 1988, Clark filed the instant suit against HGI in the same federal district court in which she had filed her first suit. Her complaint was identical to her complaint in the first suit insofar as it was predicated exclusively on her employment at HGI

from January 11, 1984, through October 31, 1986. Clark asserted two claims, i.e., (1) that HGI had deprived her of equal pay under the Equal Pay Act, 29 U.S.C. § 206(d), and (2) that HGI had discriminated against her because of her age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. She sought damages in the form of back pay, front pay, liquidated damages, attorney fees and costs.

Within her complaint, Clark alleged that HGI had paid her "at a rate less than the rate [HGI] paid males for work performance requiring equal skill, effort, and responsibility, and performed under similar working conditions," (Addendum, Part One, Tab 4 at p. 6), and that HGI's "acts, conduct, and practices ... constituted age-based discrimination against [her] with respect to her compensation, terms, conditions and/or privileges or employment in violation of [ADEA]." Id. at p. 10.

HGI moved for summary judgment, alleging that the doctrine of res judicata barred Clark's suit. In denying HGI's motion, the court found:

> The doctrine of res judicata prohibits a party from asserting in a second lawsuit any matter that might have been asserted in the first lawsuit. Prospero Associates v. Burroughs Corp., 714 F.2d 1022, 1025 (10th Cir. 1983). In order for the doctrine to apply, three elements must be present: (1) the first suit must have proceeded to a final judgment on the merits; (2) the parties must be identical or in privity; and (3) the suits must be based on the same cause of action.
>
> Here the first two elements are present .... The court concludes, however, that the two suits are not based on the same cause of action.
>
> The Tenth Circuit Court of Appeals in Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) adopted the transactional approach, advocated by the Restatement (Second) of Judgments § 24 (1982), to the third element. This pragmatic approach requires the Court to take into account three factors: 'whether the facts are related in

> time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage,' Restatement § 24(2). In determining trial convenience, the court shall examine to what extent the witnesses or proofs in the second action tend to overlap the witnesses or proofs in the first action. Restatement § 24, comment b.
>
> In the first lawsuit, plaintiff sued only for unpaid overtime compensation, However, in the case at bar, the wrong asserted is the alleged discrimination against plaintiff. In applying the factors of the Restatement, it appears that the first factor is not met, since the facts needed to prove a charge of discrimination are very different in motivation and origin from the facts needed to prove the overtime compensation charge. Furthermore, the second factor is not present. The proof, if not the witnesses, in the second lawsuit will be quite different from that in the first lawsuit. Plaintiff will have to go through the more complex methods of proving sex and age discrimination.

(Addendum, Part One, Tab 5 at pp. 2-3).

Prior to trial, the parties filed a stipulated motion to dismiss Clark's Equal Pay Act claim. The district court subsequently entered an order dismissing the claim with prejudice, thereafter, Clark's case proceeded to trial solely on her ADEA claim. The jury returned a verdict awarding Clark $65,533.00 in back pay and $598,226.00 in front pay. The district court also awarded Clark attorney fees of $33,019.50. HGI's motions for judgment notwithstanding the verdict, a new trial, or remittitur were denied.

On appeal, HGI contends that the court erred in: deciding that Clark's claim was not barred by res judicata; deciding that front pay could be awarded even though Clark had obtained a replacement job at a higher salary prior to trial; allowing the jury to determine the amount of front pay to be awarded; instructing the jury with respect to front pay.

HGI also contends that the amount of the jury's front pay

award was not supported by the evidence; the jury's back pay award was not supported by the evidence; the court erred in admitting Clark's written calculations of purported lost wages; the court erred in denying its motion for a new trial, or, in the alternative, remittur; and the award of attorney fees should be reversed. Because of its dispositive nature, our discussion will be limited to HGI's contention that Clark's instant action was barred by res judicata.

As set forth, supra, the district court denied HGI's motion for summary judgment based on res judicata after finding that "the two suits are not based on the same cause of action" and "the facts needed to prove a charge of discrimination are very different in motivation and origin from the facts needed to prove the overtime compensation charge."

In reviewing a grant of summary judgment we utilize the same standard that the district court employs. Metro Oil v. Sun Refining & Marketing Company 936 F.2d 501, 503 (10th Cir. 1991). We view the evidence most favorably to the nonmoving party to ascertain whether a genuine issue of fact exists; we review legal questions de novo. Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990). We also review de novo a district court's order denying a motion for judgment notwithstanding the verdict, applying the same standard applied by the district court. Heyen v. United States, 945 F.2d 359, 362 (10th Cir. 1991). A district court's conclusions as to res judicata are conclusions of law and reviewable de novo. N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990).

Res judicata generally applies where there is an identity of parties and of claims and a final judgment on the merits. Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1520 (10th Cir. 1990). It is designed to ensure the finality of judicial decisions. Brown v. Felsen, 442 U,S. 127, 131 (1979). Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Allen v. McCurry, 449 U.S. 90, 94 (1980); Northern Natural Gas Company v. Grounds, 931 F.2d 678, 681 (10th Cir. 1991) (Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or

could have been raised in the prior action); Sil-Flo, Inc. v. SFHC, Inc., supra. "Stated alternatively", under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1009 (10th Cir. 1990), quoting, Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1335 (10th Cir. 1988), quoting, Brown v. Felsen, 442 U.S. 127, 131 (1979).

Here, there was an identity of parties; Clark and HGI were the same, and only, parties in both suits. Moreover, the stipulated, voluntary dismissal of Clark's first suit, approved by the court with prejudice, was a judgment on the merits. Brooks v. Barbour Energy Corporation, 804 F.2d 1144, 1146 (10th Cir. 1986). Under such circumstances, res judicata barred Clark's instant suit to the degree that it was based on the same cause of action as her first suit.

Determining what constitutes a single cause of action has long been a troublesome question. Petromanagement v. Acme-Thomas Joint Venture, 935 F.2d at 1335. In May v. Parker-Abbott Transfer and Storage, Inc., supra, we stated:

> In order to determine what constitutes a single 'cause of action' in any given case, this circuit applies the transactional approach of the Restatement (Second) of Judgments § 24 (1982):
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to ail or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as to whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit

> conforms to the parties' expectations or business understanding or usage.
>
> . . . Under this approach, this circuit also recognizes that 'a "contract" is generally considered to be a "transaction," so that all claims of contractual breach not brought in an original action would be subject to bar of claim preclusion, so long as the breaches antedated the original action'. . . .

899 F.2d at 1009-10.

In May v. Parker-Abbott Transfer and Storage, Inc., supra, we applied res judicata to bar a second suit, holding that "[h]ere, appellant has brought one suit to force the payment of delinquent monthly contributions (late delivery), and now brings another seeking an audit to ensure the accurate calculation of those contributions . . . ." 899 F.2d at 1010.

Inasmuch as the doctrine of res judicata precludes parties from relitigating issues that were or could have been raised, parties cannot defeat its application by simply alleging new legal theories. See: Bill's Coal Company v. Board of Public Utilities, 887 F.2d 242 (10th Cir. 1989) (inasmuch as coal buyer had a full opportunity to litigate its antitrust claims in earlier case involving breach of contracts, res judicata barred subsequent suit attacking termination clause as being unduly restrictive of competition among coal suppliers); Bolling v. City & County of Denver, Colorado, 790 F.2d 67 (10th Cir. 1986) (res judicata barred plaintiff's 42 U.S.C. §§ 1981 and 1983 claims for wrongful termination because of sex and race where plaintiff failed to raise sex and race discrimination in prior state action when she challenged her employment termination based upon charges that she did not perform her duties satisfactorily or follow supervision); Fleming v. Travenol Laboratories, Inc., 707 F.2d 829, 833 (5th Cir., 1983) (quoting Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (adverse judgment on the merits in a Title VII action barred successive § 1983 claim where primary right and duty asserted and the primary wrong complained of are the same in each action); In Re Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988) (a legal theory or claim is part of

the same cause of action as a prior claim if it arises from "the same operative nucleus of fact"); Smith v. City of Chicago, 820 F.2d 916, 918 (7th Cir. 1987), quoting Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986 (even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains but a single cause of action); Mills v. Des Arc Convalescent Home, 872 F.2d 823, 826-827 (8th Cir. 1989) (prior judgment in Title VII suit barred § 1981 suit based on same transaction); Cemer v. Marathon, 583 F.2d 830 (6th Cir. 1978) (Where plaintiff, following his employment discharge, first filed suit alleging that his termination violated the ADEA and that action was dismissed, constituting a final adjudication on the merits, plaintiff's subsequent suit in different court alleging a breach of employment contract was barred by res judicata; both suits sought to remedy a single alleged wrong - the plaintiff's discharge).

Here, the "transaction" was Clark's employment with HGI, and her claims of breach of employment duties asserted against HGI, in totality (the two lawsuits) involved (a) unpaid overtime, (b) back pay and front pay damages under the ADEA, (c) damages under the Equal Pay Act, and (d) attorney fees and costs. Had each of these claims been asserted by Clark in her complaint filed in the first suit, they would have been heard and determined.

There is no provision in the federal rules of civil procedure requiring that a complaint state a "cause of action" or allege "facts." Rather, Fed. R. Civ. P. 8(a) provides that a pleading must set forth certain criteria in order to constitute a "claim" for relief. The code permits a plaintiff to plead alternatively and the court is authorized to award the plaintiff such relief as the evidence entitles. Thus, Rule 8(a) eliminates the "cause of action" concept, and Rule 8(e)(2) permits a party to set forth two or more statements of "'claim" alternatively or hypothetically. See also Rule 8 (a)(3) (relief may be demanded in the alterative); Rule 18(a) (a party asserting in original claim may join as many claims, legal, equitable, or maritime, as he has against an opposing party).

We hold that the district court erred in denying HGI's motion for summary judgment based on res judicata. As set forth, supra, Clark filed the instant suit in the same federal district court where she had filed her first suit, some eighteen months before. The parties were identical. There was a single "transaction" in

that the "claims" in each case were predicated on Clark's employment with HGI from January il, 1984 through October 31, 1986, The only distinction in the two suits involved the legal theories Clark advanced. However, res judicata precludes parties from "relitigating issues that were or could have been raised in the prior action." Northern Natural Gas Company v. Grounds, supra, at 681.

Notwithstanding the district court's finding to the contrary, we must hold that the two actions were "related in time, space, origin, or motivation." Restatement (Second) of Judgments § 24 (1982), supra. Furthermore, the "claims" asserted in the two cases formed a convenient trial unit," id., particularly in that the various "claims" and legal theories were predicated exclusively on Clark's employment relationship with HGI. By remitting the instant case to proceed, the district court allowed "precisely the sort of Piecemeal litigation, unnecessary expense, and waste of judicial resources that the doctrine of res judicata is designed to prevent." May v. Parker-Abbott Transfer and Storage, Inc., 499 F.2d at 1010.

REVERSED AND REMANDED for further proceedings consistent herewith.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHIRLEY CLARK,	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	Nos. 90-1353
	)	90-1362
HAAS GROUP, INC.,	)	
	)	
Defendant - Appellant.	)	

ORDER
Entered February 27, 1992

Before McKAY, Chief Judge, BARRETT, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellee's amended motion to supplement the record and appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the motion to supplement the record is denied. The petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
/s/
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-1789

SHIRLEY J. CLARK,

Plaintiff,

v.

HAAS PUBLISHING COMPANY,

Defendant.

ORDER

This matter is before the Court on defendant's Combined Motion And Brief To Dismiss Or In The Alternative Motion And Brief For Summary Judgment. Because the motion considers matters outside the pleadings, the Court will consider the Motion For Summary Judgment.

The Complaint asserts claims for relief under the Equal Pay Act, 29 U.S.C. § 206(d), and the Age Discrimination And Employment Act of 1967, 29 U.S.C. §§ 621-639. This Court has jurisdiction under 29 U.S.C. §§ 206(d), 216(b), 626(c)(1), and 633(a) and 28 U.S.C. § 1331, 1337, and 1343. The Court has read the briefs and reviewed the applicable case law, and is fully informed. A hearing would not materially assist the Court in deciding this matter.

Defendant argues that the doctrine of res judicata, or claim preclusion, bars this lawsuit. The Court disagrees and denies the defendant's Motion For Summary Judgment.

Defendant employed plaintiff in its business from January 1984 through late October 1986, when plaintiff was discharged. In May 1987 plaintiff filed a Complaint in the United States District Court for the District of Colorado, Civil Action No. 87-F-722,

alleging a cause of action for unpaid overtime compensation under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b). That lawsuit was dismissed with prejedice pursuant to a settlement agreement and stipulated motion to dismiss on July 27, 1988.

Plaintiff also filed two complaints with the Equal Employment Opportunity Commission (EEOC) in late 1986 alleging that defendant discriminated against plaintiff on the basis of her sex and/or her age. EEOC issued its right to sue letter on October 26, 1987, and this Complaint was filed on October 31, 1988.

The doctrine of res judicata prohibits a party from asserting in a second lawsuit any matter that might have been asserted in the first lawsuit. Prospero Associates v. Burroughs Corp., 714 F.2d 1022, 1025 (10th Cir. 1983). In order for the doctrine to apply three elements must be rpesent: (1) the first suit must have proceeded to a final judgment on the merits; (2) the parties must be identical or in privacy; and (3) the suits msut be based on the same cause of action.

Here the first two elements are present. The parties in the two lawsuits are identical, and the first suit, a dismissal with prejedice, is a final judgment on the merits. See e.g. Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). The Court concludes, however, that the two suits are not based on the same cause of action.

The Tenth Circuit Court of Appeals in Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988), adopted the transactional approach, advocated by the Restatement (Second) of Judgments § 24 (1982), to the third element. This pragmatic approach requires the Court to take into account three factors: "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement § 24(2). In determining trial convenience, the court shall examine to what extent the witnesses or proofs in the second action tend to overlap the witnesses or proofs in the first action. Restatement § 24, comment b.

In the first lawsuit, plaintiff sued only for unpaid overtime compensation. However, in the case at bar, the wrong asserted is the alleged discrimination against plaintiff. In applying the factors of the Restatement, it appears that the first factor is not

met, since three facts needed to prove a charge of discrimination are very different in motivation and origin from the facts needed to prove the overtime compensation charge. Furthermore, the second factor is not present. The proof, if not the witnesses, in the second lawsuit will be quite different from that in the first lawsuit. Plaintiff will have to go through the more complex mehods of proving sex and age discrimination. Accordingly, it is

ORDERED that defendant's Motion For Summary Judgment is denied.

DATED at Denver, Colorado, this 12th day of December, 1989.

BY THE COURT:

/s/
ZITA L. WEINSHIENCK, Judge
United States District Court

Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

No. 91-2076

In The

Supreme Court of the United States

October Term, 1992

SHIRLEY CLARK,

Petitioner,

v.

HAAS GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the court below correctly rule that where an employee was fired after two years of employment, filed a charge with the EEOC eighteen days after she was fired complaining of unlawful discrimination on the grounds of age and sex, sued her employer in federal district court approximately six months after she was fired seeking to recover amounts allegedly owed to her under the Fair Labor Standards Act ("FLSA"), had her federal district court case dismissed with prejudice in its entirety pursuant to an Order that had no reservations, qualifications or conditions whatsoever, and then, three months later filed a second suit in the same federal district court also seeking relief under the FLSA and alleging a claim for age discrimination, principles of res judicata barred the employee's subsequent action against the employer?

RULE 28.1 LISTING

Respondent Haas Group, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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The Respondent Haas Group, Inc. ("HGI") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 953 F.2d 1235 (1991).

STATEMENT OF THE CASE

Respondent refers this Court to the Tenth Circuit's opinion reproduced at Pages 1a through 9a of the Petition for an accurate statement of the facts and procedural history of the case. One important factual point that is not mentioned in the Tenth Circuit's opinion and that the Petitioner attempts to bury in a footnote, is that the settlement agreement pursuant to which Petitioner's first lawsuit was dismissed with prejudice, and upon which the petition is in large part based, is *not* a part of the record below. Neither the settlement agreement nor any correspondence evidencing the negotiations leading to the settlement agreement was introduced into the record below. Only after the Tenth Circuit rendered its decision did Petitioner seek to supplement the record by filing a motion to supplement the record and a newly-created affidavit purporting to support Petitioner's contention that when she executed the settlement agreement she intended to preserve certain claims, despite the fact that there is no express reservation of claims in the agreement or in the order dismissing her first suit with prejudice. The Tenth Circuit, following well-established precedent, denied Petitioner's motion to supplement the record in an order dated February 27, 1992. (Pet. at 10a). Thus, Petitioner's statement at page 5 of her Petition that "the court ignored the limiting language of the settlement

agreement," fails to note that the Tenth Circuit had no choice but to "ignore" the settlement agreement because the settlement agreement was not part of the record before it. For this reason alone, the Petition for Certiorari should be denied, because the foundation of Petitioner's argument was never part of the record below, due to Petitioner's own decision not to introduce it into evidence.

ADDITIONAL REASONS WHY THE PETITION SHOULD BE DENIED

Even if the record below were as Petitioner wishes it were, there would still be no compelling reasons to justify the granting of a writ of certiorari. As will be discussed below, neither the decision below nor the record presents the questions raised by Petitioner; the decision below is neither in conflict with the decisions of the United States Supreme Court nor the various circuit courts of appeal nor is it in conflict with the decisions cited by Petitioner in support of her reasons for granting the writ of certiorari. The Court of Appeals fully considered and correctly decided the issues before it.

1. Neither the Decision of the Court of Appeals Nor the Record Raises the Questions Presented in the Petition.

The first "Question Presented" in the Petition is whether the "principles of res judicata require that, in every case involving an employment relationship, each party must assert every claim that is available against the

other party, or be forever barred from asserting it." The Tenth Circuit, however, did not decide that question in this case. Moreover, the facts of record will not justify a determination of that question by this Court.

(a) The record does not permit the formulation or resolution of the first "Question Presented" by the Petitioner. The Tenth Circuit did not reach the question of whether, in every case involving an employment relationship, each party must assert every available claim against the other party or be forever barred from asserting it. The Tenth Circuit was faced with a narrow set of facts:

1. Petitioner was hired by HGI in January of 1984 and worked for HGI until October 31, 1986, when she was fired. (Pet. at 2a).

2. Eighteen days after she was fired, Petitioner filed a charge with the EEOC complaining of unlawful discrimination by HGI on the grounds of age and sex.

3. Approximately seven months after she was fired, and six months after she filed her employment discrimination claims with the EEOC against HGI, Petitioner sued HGI on May 18, 1987, in the United States District Court for the District of Colorado seeking to recover amounts allegedly owed to her under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* (Pet. at 2a). This case is referred to as *"Clark I."*

4. Approximately nine months later, on July 27, 1988, an Order was entered by the District Court dismissing *Clark I* with prejudice, in its entirety, with no reservations, qualifications, or conditions whatsoever. The Order

dismissing *Clark I* is set forth at page 1a of the Appendix to this brief ("App. 1a").

5. Approximately three months later, on October 31, 1988, Petitioner filed a second suit in the District Court, also seeking relief under the FLSA and alleging a claim for age discrimination. (Pet. at 2a-3a). This case is referred to as *"Clark II."*

6. Based upon these facts, the District Court denied HGI's Motion for Summary Judgment based upon the doctrine of *res judicata* (and subsequent Motion for Directed Verdict and Motion for J.N.O.V.) in *Clark II*, and HGI appealed to the Tenth Circuit. (Pet. at 11a-13a).

The foregoing constitute the facts in the record before the Tenth Circuit and are the facts upon which the Tenth Circuit was required to base, and did base, its decision in this case.

(b) Based on the particular narrow facts before it, the Tenth Circuit merely held that *Clark I* and *Clark II* were "related in time, space, origin, or motivation," and that the claims asserted in *Clark I* and *Clark II* "formed a convenient trial unit" because the claims in the two suits "were predicated exclusively on Clark's employment relationship with HGI."

The Court below issued a very narrow holding applicable only to the facts of this case. The Tenth Circuit did not reach the question of whether, in every case involving an employment relationship, each party must assert every available claim against the other party or be forever barred from asserting it. The Court ruled only as to this particular case, in which:

(i) Petitioner's employment had terminated prior to the filing of *Clark I* (Pet. at 2a);

(ii) all causes of action had accrued prior to the filing of *Clark I*;[1]

(iii) Petitioner was consciously aware of the alleged facts upon which her discrimination claim was based prior to the filing of *Clark I*;

(iv) Petitioner had received a right to sue letter from the EEOC prior to the resolution of *Clark I* (Pet. at 12a);

(v) *Clark I* sought relief under the FLSA arising out of the employment relationship;

(vi) *Clark I* was dismissed with prejudice in its *entirety* by Order of the Court, with Petitioner's consent and participation, with no reservation of any claims and no other qualifications whatsoever; and

(vii) the relief sought in *Clark II* under the ADEA is, as a matter of law, deemed to be unpaid compensation due pursuant to the FLSA.

The Court held that under these facts, the claims in *Clark II* arose out of the same transaction or series of transactions as the claims in *Clark I*, and the doctrine of *res judicata* therefore applied. Furthermore, the Court went beyond the "same transaction" analysis and considered the individual factors set forth in Section 24(2) of the

---

[1] All of Petitioner's claims in *Clark I* and *Clark II* arose out of her employment relationship with HGI which relationship terminated prior to the filing of *Clark I*.

Restatement (Second) of Judgments (1982) (the "Restatement") and reached the same conclusion. Petitioner's first "Question Presented" to this Court, whether "principles of res judicata require that, in every case involving an employment relationship, each party must assert every claim that is available against the other party, or be forever barred from asserting it," simply cannot be extracted from the Court of Appeals' opinion. The Court of Appeals' opinion is fact-bound and is limited to the particular unique factual setting of this case.

(c) The second "Question Presented" in the petition is whether the Tenth Circuit erred by failing to consider "proffered evidence of the parties' intent to limit the scope of the settlement" pursuant to which *Clark I* was dismissed with prejudice. Petitioner's second question put to this Court misses the mark. The question before the Tenth Circuit was not whether the proffer of "evidence" to the Court of Appeals after it had rendered its decision should have been considered by the Court of Appeals. The answer to that question is obviously "no." The question before the Tenth Circuit was whether Petitioner, in the district court, met her evidentiary burden of establishing a genuine issue to be tried. *See* Federal Rule of Civil Procedure 56. In the district court, in opposition to HGI's motion for summary judgment, Petitioner was required to bring forth all of her evidence in opposition to HGI's motion. *See, e.g., British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied* 440 U.S. 981 (1979) (a party may not rely on legal memoranda in opposition to motion for summary judgment). Petitioner simply failed to make an adequate record in opposition to HGI's motion for summary judgment before the district

court.[2] As explained above, neither the factual nor legal predicate to Petitioner's second "Question Presented" exists in the Tenth Circuit's opinion. The "proffered" evidence, consisting of Petitioner's hearsay-filled Affidavit to which numerous unauthenticated documents were attached, was not filed with the Tenth Circuit until *after* it had rendered its decision in the case. Thus, the "proffered" evidence was not before the Court when it rendered the opinion Petitioner asks this Court to review. The factual predicate for the proposition underlying the second "Question Presented" is therefore non-existent because the Tenth Circuit could not ignore what had not even been presented to it (or to the District Court) when it issued its ruling.

Furthermore, Petitioner cites no authority in support of the proposition that the Tenth Circuit erred by denying her motion to supplement the record after it issued its opinion. In fact, procedural rules and case law make clear that appellate courts cannot receive or consider evidence that was not before the court below. *See, e.g.*, F.R.A.P.

---

[2] It is important to realize the impact of what petitioner is suggesting. She suggests that certain evidence should have been introduced in the District Court in opposition to HGI's Motion for Summary Judgment, but petitioner simply failed to introduce the evidence in the District Court. Once the Court of Appeals decided that HGI's Motion for Summary Judgment should have been granted, petitioner argued (and now argues): "Let me go back to the District Court and start over and introduce the evidence I should have introduced, and then we can go back to the Tenth Circuit, and I'll have a better argument." Obviously, such a procedure would destroy the finality of any decision in our adversary system. Ironically, finality is what the doctrine of *res judicata* seeks to preserve.

10(a); Tenth Circuit Rule 10.2; *U.S. v. Elias*, 921 F.2d 870 (9th Cir. 1990) (papers not filed with district court or admitted into evidence are not part of the record or appeal); *Coplin v. U.S.*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom. O'Connor v. U.S.*, 479 U.S. 27 (appellate courts cannot receive or consider evidence that was not before the court below).

2. There is No Conflict in the Courts of Appeal.

Each of the cases cited by Petitioner in support of her argument that the decision below is "squarely contrary to the holdings of the other circuits that permit employees to raise claims arising out of different aspects of the same employment relationship in successive actions" (Pet. at 7) is distinguishable on its facts from the case before this Court.

In *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), Kathleen Wu, a tenured professor at the University of Alabama, brought suit against several university officials seeking relief under the Equal Pay Act ("*Wu I*"). The district court tried *Wu I* from March 31 to April 9, 1986. In August 1986, *after* the trial of *Wu I*, Kathleen Wu's husband, also a tenured professor at the University of Alabama, was invited to seek another job. Kathleen Wu and her husband then filed suit together against the University of Alabama ("*Wu II*") alleging that university officials had violated 42 U.S.C. § 2000e (1982) by retaliating against the Wus for bringing *Wu I*.

These facts are obviously distinguishable from the facts in the instant case. First, the claims brought in *Wu II*

did not arise until after the trial of *Wu I* and could not possibly have been brought in *Wu I*. Second, the Wus have not been terminated; their relationship with their employer continues. Third, the parties in *Wu I* and *Wu II* were different. In *Wu I* only Kathleen Wu brought suit. In *Wu II*, Kathleen Wu and her husband were plaintiffs. On these facts, very different from the facts in this case, the Eleventh Circuit found that *Wu II* was not barred by *Wu I*.

May v. Morganelli-Haumann & Assoc., 618 F.2d 1363 (9th Cir. 1980), does not even address res judicata. Petitioner flatly misstates the holding in that case. In *May*, an architect sued a developer in state court for breach of contract for failure to make the payments required by a design contract. Shortly before he agreed to settle that lawsuit, the architect discovered that some of his drawings existed in the files of the architectural firm hired to replace him on the project. *Id.* at 1365. He then brought suit in federal court against the second architectural firm and others. The district court granted the defendants' motion for summary judgment in the second suit on the ground that the developer had discharged all of his contractual obligations to the architect in the state court suit and that the developer therefore owned the copyright to the drawings under the "work for hire" doctrine. The Ninth Circuit reversed on the ground that the design contract was divisible (like an installment contract) and that the architect had elected to treat the developer's alleged breach as partially preserving his rights with respect to any use of the drawings by the developer contrary to the terms of the contract. *May*, 618 F.2d at 1367.

May is not even close factually to the instant case. In *May*, unlike this case, the defendants in the two actions brought by the architect were completely different whereas here Petitioner sued only HGI in *Clark I* and *Clark II*. In *May*, unlike this case, the architect brought his cases in different courts. In *May*, unlike this case, the Court did not discuss res judicata.

Like *Wu* and *May*, *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), the third appellate decision relied on by Petitioner in an effort to persuade this Court that a circuit split exists, is also factually distinguishable from this case. In *Brantley*, a cafeteria worker in a public elementary school in Mississippi was fired after she placed her son in a private segregated school. The cafeteria worker sued the school board in state court, but the state court dismissed her suit for lack of jurisdiction and the Mississippi Supreme Court affirmed. The worker then sued in federal district court under 42 U.S.C. § 1983. The federal district court granted defendant's motion for summary judgment on res judicata grounds and the Fifth Circuit reversed on the ground that the federal district court had misconstrued the preclusive effect of the Mississippi Supreme Court's decision affirming dismissal of the state court suit. As Judge Garwood noted in his concurring opinion in *Brantley*:

> . . . [T]he Mississippi court decisions were primarily based on jurisdictional grounds, namely, that in each case the chancery court had no original jurisdiction. In such circumstances, Mississippi apparently does not give preclusive effect to alternative determinations on the merits.

Brantley, 718 F.2d at 1360. Thus, like *Wu* and *May*, *Brantley* is distinguishable from the instant case. Unlike the instant case, *Brantley* did not even involve the preclusive effect of a decision on the merits.

In sum, the Tenth Circuit's decision does not conflict with the decisions in other circuits cited by Petitioner.

Petitioner's other arguments regarding a conflict of decisions are based upon an incorrect and overly-broad reading of the Tenth Circuit's decision. Petitioner's arguments are based on the false premise that the Tenth Circuit held that, in every case involving an employment relationship, each party must assert every claim that is available against the other party or be barred from asserting it. In its decision below, the Tenth Circuit makes no such sweeping generalization and limits its holding to the facts of this case. *See* Pet. at 8a-9a. The Tenth Circuit's decision is fact-bound and merely involves an application of the principles of res judicata to a situation in which an employee who was terminated from her employment was aware upon termination of all facts giving rise to her claims based on the employment relationship, which claims as a matter of law, all sought relief under the FLSA, elected to pursue her claims piecemeal rather than bring all of her claims in one action. On these particular facts, the Tenth Circuit held that Petitioner was precluded from "relitigating issues that were or could have been raised in the prior action." (Pet. at 9a).

Petitioner is, therefore, incorrect that the Tenth Circuit's decision conflicts with decisions of other circuits interpreting Federal Rule of Civil Procedure 13 (compulsory counterclaims). The Tenth Circuit simply did not

hold that all employment-related claims must necessarily be brought together at one time. The Tenth Circuit held that, where Petitioner had been terminated, was aware upon termination of all facts giving rise to all claims under the FLSA stemming from the employment relationship, filed suit alleging some but not all of her claims, had her suit dismissed with prejudice and without a reservation of claims, and then attempted to file a second suit against her employer for events allegedly occurring during the employment relationship, principles of res judicata barred such piecemeal litigation.

Likewise, Petitioner is incorrect that the Tenth Circuit's opinion conflicts with other Circuit's decisions interpreting 28 U.S.C. § 1441(c). Because the Tenth Circuit did not hold that, in every lawsuit between an employee and employer each party must raise all claims against the other or lose them, Petitioner's analogy to decisions interpreting the scope of pendent jurisdiction is inappropriate.

Petitioner is also incorrect in contending that the Tenth Circuit's decision conflicts with the holdings of other courts involving consideration of the parties' intent under settlement agreements. In this case, there was no evidence properly before the District Court or the Tenth Circuit regarding the parties' intent with respect to the settlement agreement that led to the dismissal of *Clark I*.

Petitioner is incorrect in contending that the Tenth Circuit's decision conflicts with decisions of other circuits regarding release of ADEA claims. First, Petitioner provided no evidence to the district court of her intent regarding the settlement agreement. Second, Petitioner could have "carved out" her ADEA claim when *Clark I*

was dismissed, but she did not. Rather, she opted to attempt to "blow one by" HGI by executing a settlement agreement and agreeing to a dismissal with prejudice and without reservation that appeared to bar further claims arising out of the employment relationship, only to spring a second lawsuit on HGI after it had settled *Clark I*.

Furthermore, although Petitioner's policy arguments are interesting, they are unfounded based upon the fact-bound decision of the Tenth Circuit. The Tenth Circuit's decision simply does not require employers and employees, as Petitioner exaggeratedly suggests, "to level all of their guns at one another" and "keep blasting away to a final conclusion on every conceivable claim." (Pet. at 17). Rather, the Tenth Circuit's decision instructs terminated employees who sue their employers not to "sandbag" by filing suit on some but not all of their claims arising from the employment relationship, settling those claims and dismissing, without reservation of any claims, the lawsuit in which only some of the claims were brought, and then filing *another* lawsuit against the employer based on the same employment relationship at issue in the first case.

3. The Court of Appeals Fully Considered and Correctly Decided the Issues.

"The doctrine of res judicata prohibits a party from asserting in a second lawsuit any matter that might have been asserted" in a prior lawsuit . . . ," and any matter that "might have been asserted" in the first lawsuit is barred "even if it was not actually asserted" in the first

lawsuit. *Prospero Assocs. v. Burroughs Corp.*, 714 F.2d 1022 (10th Cir. 1983). In *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), the Tenth Circuit expressly adopted the approach of the Restatement (Second) of Judgments ("the Restatement") in explaining how to determine whether claims asserted in a second lawsuit "might have been asserted" in a prior lawsuit. *Id.* at 1335.

In Section 24(1), the Restatement makes it clear that a party may have numerous claims, rights, and remedies arising out of a given "transaction" with another party or arising out of a "series of connected transactions" with another party. The Restatement also explains that the doctrine of res judicata bars any claims arising out of any given "transaction" with another party if a claim asserted in a prior lawsuit arose out of the same "transaction" between the same parties. The Restatement further explains that this preclusion of claims also bars any claim arising out of any "series of connected transactions" with any party if a claim asserted in a prior lawsuit arose out of the same "series of connected transactions" between the same parties. *Id.* at 1335.

In Section 24(2), the Restatement explains how to determine what grouping of facts constitutes a "transaction" and what grouping of transactions constitutes a "series of connected transactions." In making this determination, the trial court should consider the following:

> (i) whether the facts are related in time, space, origin *or* motivation;
>
> (ii) whether the facts form a convenient trial unit; and

> (iii) whether treatment of the facts as a unit conforms to the parties' expectations or business understanding or usage.

Id.

The Tenth Circuit in *Petromanagement*, however, suggested that, in some circumstances, the above-listed factors need not be considered in determining whether claims arise out of the same "transaction." The Court explained that all claims that arise out of a given legal relationship, such as a contractual relationship, arise out of the same "transaction." Thus, any and all currently-existing claims for various breaches of various provisions of a given contract arise out of the same "transaction." As stated by the *Petromanagement* Court "even when there is not a substantial overlap [of the witnesses or proofs in the two actions], the second action may be precluded if it stems from the same transaction or series." *Id., quoting* Restatement (Second) of Judgments § 24, comment b, at 199.

The claims asserted by Petitioner in *Clark I* arose out of the employment relationship between HGI and Petitioner. The claims asserted by Petitioner in *Clark II* also obviously arose out of the employment relationship between HGI and Petitioner. After the dismissal of *Clark I* with prejudice by Order of the trial court, Petitioner once again contended in her Complaint in *Clark II* that HGI failed to follow its own rules and policies and treated her unfairly.

Pursuant to the explanation in the Restatement, as expressly adopted by the Tenth Circuit, the employment relationship between Petitioner and HGI was a single

"transaction." There is no meaningful distinction in this context between a contractual relationship between two parties and the employment relationship between Petitioner and HGI. The claims asserted in *Clark I* arose out of this employment relationship or "transaction," and the claims in *Clark II* also arose out of this employment relationship or "transaction," and the claims asserted in *Clark II* "might have been asserted in the previous cause of action." *Prospero Assocs. v. Burroughs Corp.*, 714 F.2d 1022 (10th Cir. 1983). Therefore, no further analysis was necessary to determine that the claims asserted in *Clark II* were barred by Petitioner's failure to assert them in *Clark I*, because "even when there is not a substantial overlap [of the witnesses or proofs in the two actions], the second action may be precluded if it stems from the same transaction or series." *Petromanagement* at 1336.

Even though, under *Petromanagement*, the Court of Appeals did not have to do so, it considered the factors set forth in Section 24(2) of the Restatement, and reached the conclusion that the claims in *Clark II* arose out of the same transaction as did the claims in *Clark I*.

The first factor that the Restatement suggests the Court should consider is whether the claims asserted in *Clark I* are related to the claims asserted in *Clark II* in time, space, origin, *or* motivation. The facts are clearly related in terms of space in that the claims in both *Clark I* and *Clark II* arose out of events at Petitioner's place of employment. Furthermore, the claims for lost overtime are clearly related in time to the claims asserted in *Clark I*; all claims in both *Clark I* and *Clark II* arose out of the events during Petitioner's employment with HGI.

Second, the Restatement suggests that the Court consider whether the claims in *Clark II* and in *Clark I* form a convenient trial unit. Clearly, since *all* claims arose out of the employment relationship between HGI and Petitioner, which relationship had ended before the filing of either *Clark I* or *Clark II*, *all* claims formed a convenient trial unit and would normally be tried in one action. Furthermore, the very nature of the claims indicates that there would likely have been a "substantial overlap [of the witnesses or proofs in the two actions]" had the claims in both *Clark I* and *Clark II* been tried together. *Petromanagement* at 1336. The doctrine of res judicata cannot be dependent upon identical proof and witnesses or the doctrine would never apply to claims "that might have been asserted in the previous cause of action, even if [they were] not actually asserted." *Prospero* at 1025. To require the causes of action to be identical, as did the trial court in its order denying HGI's Res Judicata Motions, is to eliminate the essence of the doctrine of res judicata as stated in *Prospero*.

Finally, the Restatement suggests that the Court should consider whether the parties would have reasonably expected the claims in *Clark II* to have been tried in the same action as the claims in *Clark I*. Once again, it is obvious that an employer served with a Complaint by a former employee nearly one year after the employee has been terminated, and eleven months after the employee had filed her EEOC grievance, would include any discrimination claims.

Petitioner asserted in *Clark I* some, but not all, of her claims arising out of her employment relationship with HGI. In return for payment from HGI, Petitioner agreed

to dismiss, and did dismiss, *Clark I* with prejudice and *without qualification*. That dismissal barred the later assertion of any claims arising out of the employment relationship between Petitioner and HGI "that might have been asserted in the previous cause of action, even if [they were] not actually asserted." *Prospero* at 1025.

In its opinion below, the Tenth Circuit carefully weighed the facts and considered the case law and correctly decided that the dismissal with prejudice of *Clark I* precluded claims raised in *Clark II*. The Tenth Circuit did not, as Petitioner suggests, extend its holding in *May v. Parker-Abbott Transfer and Storage*, 899 F.2d 1007 (10th Cir. 1990), and did not hold as Petitioner states (Pet. at 5): "that all claims – whether or not they are based on an employment contract – that arise out of the same employment relationship, necessarily arise out of a single transaction, and thus must be raised in a single action, or are barred."

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 87 F 722

SHIRLEY J. CLARK,

Plaintiff,

v.

HAAS PUBLISHING COMPANY,
a Georgia corporation,

Defendant.

ORDER OF DISMISSAL

(Filed July 27, 1988)

THIS MATTER is before the Court on the parties' Stipulated Motion to Dismiss, filed July 26, 1988 to dismiss the above-captioned action with prejudice, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the above-captioned matter is DISMISSED with prejudice, each party to bear their own costs.

DATED this 27 day of July 1988, at Denver, Colorado.

BY THE COURT:

/s/ Sherman G. Finesilver
Sherman G. Finesilver,
Chief Judge
United States District Court

91-2076

Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

No. 91-2097

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

On July 24, 1992, Respondent Haas Group, Inc. ("HGI") filed its Brief in Opposition to Petition for Writ of Certiorari (the "Brief in Opposition"). On July 31, 1992, counsel for HGI received via telecopy a letter from Petitioner's counsel questioning three factual statements made by HGI in its Brief in Opposition regarding the state of the record. HGI files this Supplemental Brief in

Opposition to clarify the statements with which Petitioner has taken issue so that this Court has a clear understanding of the state of the record below.

The statements in HGI's Brief in Opposition to which Petitioner's counsel has objected and which HGI would like to clarify are as follows:

1. "Petitioner simply failed to introduce the evidence [of intent regarding the settlement agreement] in the District Court." (Brief in Opposition, at 7).

2. "[T]here was no evidence properly before the District Court or the Tenth Circuit regarding the parties' intent with respect to the settlement agreement that led to the dismissal of *Clark I*." (Brief in Opposition, at 11).

3. "Petitioner provided no evidence to the district court of her intent regarding the settlement agreement." (Brief in Opposition, at 12).

Petitioner's counsel has pointed out to counsel for HGI that in support of her brief in opposition to HGI's motion for summary judgment on res judicata grounds, Petitioner attached the Affidavit of Barry D. Roseman, Petitioner's lawyer in *Clark I*. A copy of the Affidavit of Bary D. Roseman (the "Roseman Affidavit"), which was never separately filed in the District Court and which does not appear on the docket sheet of the District Court, is set forth at pages App. 1-App. 3 of the Appendix to this supplemental Brief.

The Roseman Affidavit is not competent evidence, should not have been considered by the District Court, and was properly ignored by the Court of Appeals. The

Roseman Affidavit was offered by Petitioner in opposition to HGI's summary judgment motion. Federal Rule of Civil Procedure 56(e) governs the form of affidavits offered in connection with summary judgment motions and states in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

The Roseman Affidavit fails to even approach the minimum requirements set forth in Federal Rule of Civil Procedure 56(e) governing the use of affidavits in the summary judgment context. The Roseman Affidavit is nothing more than a self-serving stream of pure hearsay, double-hearsay, and triple-hearsay that fails to "set forth such facts as would be admissible in evidence." Mr. Roseman attempted through his affidavit to tell the trial court what he believed he remembered the settlement agreement said. Besides constituting inadmissible hearsay, the Roseman Affidavit does not reach the level of "evidence" because the documents referred to and described in the Roseman affidavit are not "attached thereto" and were not "served therewith" as required by Rule 56(e).

Thus, HGI's statements regarding Petitioner's failure to provide evidence regarding the settlement agreement

should be understood by this Court to mean that Petitioner failed to offer any competent or admissible evidence before the District Court regarding the settlement agreement.

CONCLUSION

For these reasons, and for the *numerous additional and independently sufficient reasons* set forth in HGI's Brief in Opposition, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civ.: Action No. 88 Z 1789

SHIRLEY J. CLARK,

Plaintiff,

v.

HAAS PUBLISHING COMPANY, a Georgia corporation,

Defendant.

AFFIDAVIT OF BARRY D. ROSEMAN

CITY AND COUNTY OF DENVER)
) ss.
STATE OF COLORADO)

BARRY D. ROSEMAN, being first duly sworn, deposes and states as follows:

1. I was the attorney for Shirley J. Clark in a case she brought against Haas Publishing Company in this Court, *Clark v. Haas Publishing Co.*, Civil Action No. 87 F 722.

2. The only claim I made in that case on behalf of my client was that the defendant had violated the Fair Labor Standards Act by failing to pay her overtime compensation for work she had done for that company. No other substantive claim was brought in that case and, in

particular, my client did not include in that case any claim that the defendant had terminated her employment in violation of Title VII of the Civil Rights Act of 1964, in violation of the Age Discrimination in Employment Act of 1967, or in violation of her other legal rights.

3. That case was settled, and my client signed the Settlement Agreement on July 18, 1988. That Settlement Agreement explicitly provides that my client released and discharged the defendant only from any claim for unpaid overtime compensation or minimum wages under the Fair Labor Standards Act or any Colorado state statute.

4. I have reviewed a copy of this Settlement Agreement provided to me by Ms. Clark's attorney in this case. My own file for the overtime-compensation case is in storage. Last month, when I moved my offices, I moved the box containing that file, along with dozens of other boxes containing other closed-case files, to a self-storage facility located in Adams County. I have not been able to locate my file in the earlier case yet, since I pulled a muscle in my back while I was trying to sort out those closed-case file boxes on Sunday, March 12, 1989.

5. Randall W. B. Purvis, the attorney for the defendant in Ms. Clark's earlier overtime-compensation case against Haas Publishing Company, prepared the first draft of the settlement agreement in that case. I recall that his draft of that agreement recited that my client released and discharged Haas Publishing Company from all claims she had or might have against it "from the beginning of the world" to the date of her signature on that document. I recall objecting to this language, and recall informing Mr. Purvis that my client would release Haas

Publishing Company only from any claims for unpaid overtime-compensation or minimum wages. I recall that he agreed to modify the settlement agreement to limit its scope only to that category of claims.

6. My secretary typed the Settlement Agreement that was signed by Ms. Clark; Robert C. Metz, President of Haas Publishing Company; Mr. Purvis; and me. This document contains our agreement as to the limited scope of the release my client provided to the defendant.

FURTHER Affiant sayeth not.

/s/ Barry D. Roseman
BARRY D. ROSEMAN

The above and foregoing Affidavit of Barry D. Roseman was subscribed and sworn to before me on the twenty-fourth day of March, 1989.

/s/ Illegible
Notary Public

Witness my hand and notarial seal.

My commission expires 22 September 1992.

91-2076 No. 91-2097

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In the
Supreme Court of the United States
OCTOBER TERM, 1991

SHIRLEY CLARK,

Petitioner,

v.

HAAS GROUP, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

The Petition showed that, under the ruling below, in any case between an employer and an employee, all possible employment-related claims must be litigated or they are lost, and that the parties cannot exclude any of the claims from a settlement, even if they plainly intend to do so. Respondent argues that the questions presented in the Petition are not squarely raised because the opinion below was highly fact-bound, and because petitioner supposedly relied on facts not in the record to show that the parties intended the settlement of petitioner's earlier lawsuit not to waive the claims in this action. Neither argument is correct, and indeed both are contradicted by respondent's own briefs in this Court.

1. **The Tenth Circuit Decided as a Matter of Law That All Claims Relating to an Employment Relationship Arise Out of the Same Transaction, and So Must Be Litigated Together.**

The Opposition begins, at 2-6, by describing the holding below as "very narrow, applicable only to the facts of this case." *Id.* 4. The principal flaw in this argument is that it is flatly contrary to the arguments in the last part of the Opposition, at 13-18. In that part of its Opposition, respondent attempts to explain why the court below ruled correctly, and in this regard, describes -- accurately, we believe -- the rule of decision enunciated below in sweeping terms.

Thus, on the one hand, in arguing that the first question is not squarely presented, respondent asserts that the Tenth Circuit's holding is fact-bound, and rests on a careful analysis of a large number of facts, in accordance with the multi-factor test of the Restatement (Second) of Judgments. Opp. 5-6. But in arguing that the decision was correct, respondent defends the Tenth Circuit's holding that "in some circumstances" those factors need not be considered in determining whether claims arise out of the same transaction, Opp. 15-16, citing the Tenth Circuit's earlier ruling to the same effect in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988). *Petromanagement*, in fact, squarely held that "all claims that arise out of a given legal relationship, such as a contractual relationship, arise out of the same 'transaction'" and hence must be raised and litigated or are deemed waived. Opp. 15. The Opposition continues by repeating the argument it made to the Tenth Circuit, and again correctly characterizes the sweeping opinion of the Tenth Circuit: "the employment relationship between Petitioner and [respondent] was a single 'transaction.' . . . Therefore, no further analysis was necessary to determine that the claims asserted in *Clark II* were barred by Petitioner's failure to assert them in *Clark I*, ..." Opp. 15-16.

Respondent does assert that, even though the Tenth Circuit's analysis did not require consideration of the individual factors of the Restatement, the court below did consider those

factors. Opp. 16, 18. Respondent does not cite the pages of the opinion below where this consideration is alleged to appear, and for good reason -- it never took place. To the extent that the court below even mentioned those factors, it deemed them all satisfied by the fact that the claims all arose out of a single employment relationship. Pet. App. 9a. Even **respondent's** version of the Tenth Circuit's consideration of the factors shows that the analysis of each factor begins and ends with the fact that the claim is made by an employee against an employer. Opp. 16-17. Thus, the claims are related in time and space because they arose out of events at the place of employment, and during the time of the employment. *Id.* 16. The claims form a convenient trial unit "since *all* claims arose out of the employment relationship," *id.* 17, and the parties would reasonably have expected the claims in the two cases to be tried together because they were both brought by a former employee against her employer. *Id.*

Respondent's effort to show the absence of a conflict between this case and those cited in the Petition fails because the attempted distinction rests in large part on the proposition, which we have refuted above, that the Tenth Circuit's opinion is fact-bound. Opp. 11-12. However, respondent also attempts to distinguish three of the cases. It argues that *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), is distinguishable because the claims in *Wu II* did not arise until after *Wu I*, because the employment relationship did not terminate, and because there was an additional party in *Wu II*. Opp. 8-9. Although all these facts may be correct, they were not the basis for the Eleventh Circuit's res judicata holding that the claim of Ms. Wu in the second action against her employer was not barred by her loss of her first suit against the same employer. 863 F.2d at 1549. Similarly, *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), is said to be distinguishable because the concurring opinion rested on the fact that the ruling on the first claim was "primarily" jurisdictional, and not res judicata for that reason. Opp. 10. Although that is an accurate description of the concurring opinion, that was not the basis for the majority opinion, which rested on the grounds stated in the Petition at 8.

Finally, *May v. Morganelli-Heumann & Assoc.*, 618 F.2d 1363 (9th Cir. 1980), is said to be distinguishable because the claims

were brought in two different courts, Opp. 10, and because the opinion "does not even address res judicata." *Id.* But respondent does not explain why the same court/different court has any more relevance to the analysis than the fact that May was male but Clark is female. *May* rested on two propositions: that one who has been hired to do certain work has the choice of suing over some, but not all, claims related to the contract of hire, and that the filing and settlement of the first suit on the contract do not preclude a later suit on other claims arising out of the same relationship. The Ninth Circuit's holding that May had the legal ability to exclude some claims from the preclusive effects of suit over the same contract of hire is flatly inconsistent with the Tenth Circuit's holding here, that all such claims necessarily arise out of the same transaction and must be brought together. Although the *May* court spoke in terms of election of remedies doctrine, the case is recognized as a leading example of judicial use of election language to achieve sound claim preclusion results. 18 Wright, Miller & Cooper, *Fed Prac. & Proc.: Civil* § 4476, at 777-778 (1981).[1]

In addition to attempting to deny the existence of a circuit conflict, respondent tries to downplay the reasons advanced in the Petition for deeming this a highly significant issue of federal law. As we demonstrated, Pet. 15-18, the decision below will encourage employers and employees to increase both the number of claims brought against each other and the intensity of their litigation, to the disadvantage of judicial dockets and amicable employment relations. Respondent concedes that these arguments are "interesting," but argues that "they are unfounded based upon the fact-bound decision of the Tenth Circuit." Opp. 13. It further contends that the decision below has additional benefits because it prevents employees from sandbagging employers by settling one set of claims without even letting the employer know that other suits are contemplated. *Id.*

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[1] Respondent's assertion that "the defendants in the two actions . . . were completely different," Opp. 10, if relevant at all, is correct only in the most technical sense, because the parties in interest were the same. The first action was brought against Jones, who had hired May. The second was brought against the executor of Jones' estate, plus the firm that Jones had hired after May and to whom Jones had given May's work product, allegedly without payment to May.

But it is respondent who ignores the record in this case. As the Petition showed at 2-3, and as acknowledged by the Opposition at 5, at the time *Clark I* was settled, petitioner had already filed her EEOC charge, thus plainly putting respondent on notice of her discrimination claims. *Clark I* was then settled, with the settlement agreement limited to overtime and minimum wage claims. To be sure, respondent claims that there is no evidence in the record on that issue, but that representation is flatly incorrect, as we now show.

2. **The Issue of Intent to Limit the Scope of the Settlement of the First Action is Squarely Presented Here, Because Evidence of the Parties' Intent Was Introduced in the District Court.**

In its original Opposition, respondent advanced only one objection to the second Question Presented -- it claimed that the question of whether the parties intended to limit the scope of the settlement of the first lawsuit is not even properly before this Court, because "petitioner simply failed to introduce the evidence in the District Court," Opp. 7, but only tried to present it on a petition for rehearing after the Tenth Circuit ruled. *See also id.* at 11 ("there was no evidence properly before the District Court or the Tenth Circuit regarding the parties' intent with respect to the settlement agreement that led to the dismissal of *Clark I*"), 12 ("Petitioner provided no evidence to the district court of her intent regarding the settlement agreement.").

The Petition asserted that petitioner had introduced an affidavit from her counsel in *Clark I* in the district court on the issue of intent. Pet. 3. Although respondents initially accused petitioner of basing her Statement of Facts on materials outside the record, Opp. 1, respondent now acknowledges that the Roseman affidavit, which is appended to the Supplemental Memorandum in Opposition ("Supp. Opp.") at App. 1 to App. 3, and which sets forth the recollections of petitioner's trial counsel in *Clark I* on the issue of intent, was in fact filed in the district court, in opposition to respondent's motion for summary judgment.

In its Supplemental Opposition, respondent now argues that this affidavit was based on hearsay, was therefore insufficient to defeat summary judgment under Rule 56(e), and so was properly ignored by the court of appeals. There are three flaws in this objection.

First, the affidavit is not based on hearsay. It is an account of the course of the settlement negotiations by petitioner's then-counsel, Mr. Roseman, and it is based on his personal knowledge of those negotiations, as well as the agreement itself, which Mr. Roseman read before executing his affidavit. Mr. Roseman's descriptions of statements by respondent's counsel, Mr. Purvis, are not hearsay, as respondent contends, Supp. Opp. 3, because they are not offered to prove the truth of Mr. Purvis' statements. Indeed, if the recollections of the lawyers who negotiate a settlement agreement are not proper evidence to determine whether certain subjects were considered, or waived, then courts will never be able to review the negotiating history to decide the scope of res judicata. That is precisely the rule for which respondent contended below, but which other courts of appeals have rejected, and the propriety of which is at the heart of the second question presented.[2]

Second, when the Roseman affidavit was filed, respondent did not object on Rule 56(e) grounds, or indeed on any other grounds, when petitioner could have remedied any evidentiary defects. Instead, respondent submitted a counter affidavit from its president that discussed the settlement agreement, provided respondent's understanding of its significance, and offered the agreement to the court if it desired to review it. Its reply brief on summary judgment argued that, for res judicata purposes, it didn't matter what claims the parties did or did not intend to release or

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[2] It is nothing short of outrageous for respondent to rely on the fact that Roseman did not attach the Settlement Agreement to his affidavit. Supp. Opp. 2. As the Petition noted, at 4 n.2, that agreement contained a confidentiality clause that respondent refused to waive. In its reply brief on summary judgment in the district court, respondent offered to present the Agreement for the court's inspection if the court so requested. Because it denied summary judgment, the court apparently found it unnecessary to take respondent up on its offer.

resolve, and that any such intent to limit the effect of the agreement was relevant only to collateral estoppel, not res judicata. District Court Reply Br. at 4. Nor, indeed, did respondent object to the Roseman affidavit in the court of appeals. Accordingly, any possible defects in the Roseman affidavit have been waived, 10A Wright, Miller & Kane, *Fed. Prac. & Proc.: Civil* § 2738, at 507-509 (2d ed. 1983); *Scharf v. United States Attorney General*, 597 F.2d 1240, 1243 (9th Cir. 1979), and the validity of resppondent's argument below, which the court of appeals accepted, is squarely presented.

Third, whether or not the court of appeals might have been justified in deciding that the Roseman affidavit does not meet Rule 56(e) standards, the fact remains that it did not rule on that basis. Indeed, under respondent's theory of the case, it was unnecessary for that court even to consider the sufficiency of the affidavit because the intent of the parties is irrelevant. Respondent apparently wishes, in retrospect, that the court of appeals had not accepted its legal analysis and had not ignored the parties' intent, but there can be no doubt the propriety of the refusal of the court of appeals to consider the issue of intent is squarely presented on this record.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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